MEMORANDUM

DATE: May 11, 2001

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 11, 2001, in New Orleans, Louisiana. At that meeting, the Advisory Committee approved a number of proposed amendments that had been published for comment, declined to approve one such proposed amendment, removed four items from the Committee's study agenda, and discussed but took no action on several other items. Following the April 11 meeting, the Committee took two minor actions by mail ballot; those two actions are identified below.

Detailed information about the Committee's activities can be found in the minutes of the April 11 meeting and in the Committee's docket, both of which are attached to this report.

II. Action Items

Several proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") — as well as several complementary proposed amendments to the Federal Rules of Civil Procedure ("FRCP") — were published for comment in August 2000. The Committee received 20 written comments; no commentator asked to testify in person about the proposed amendments. The Committee approved all but one of the proposed amendments for submission to the Standing Committee. Modifications were made to many of the proposed amendments and Committee Notes, but, in the Committee's view, none of those modifications is so substantial as to require republication.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 1. Scope of Rules; Title

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(b) ~~Rules Do Not Affect Jurisdiction.~~ ~~These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

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Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and

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*New material is underlined; matter to be omitted is lined through.

§ 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

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1. Recommendation

The Committee proposes to abrogate Rule 1(b), which provides that the rules of appellate procedure "do not extend or limit the jurisdiction of the courts of appeals." Rule 1(b) has been rendered obsolete by recent Congressional enactments that give the Supreme Court authority to use the federal rules of practice and procedure to define when a decision of a district court is final for purposes of 28 U.S.C. § 1291 and to provide for appeals of interlocutory orders that are not already authorized by 28 U.S.C. § 1292.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) opposes the amendment. The Group argues that Rule 1(b) "is an appropriate reminder that the Rules are not intended to create, expand, or reduce the jurisdiction of the federal courts." As to the Committee's concern about §§ 1292(e) and 2072(c), the Group argues that rules enacted under § 2072(c) would not truly "extend" the jurisdiction of the

federal courts, and, in any event, that Rule 1(b) should not be repealed "based on what the Rules Committee and ultimately the Supreme Court *might* do in the future." The Group argues that, if and when the Committee and the Supreme Court act under § 1292(e), they can simultaneously amend Rule 1(b). Finally, the Group suggests that, if the Committee is intent on acting at this time, it should not abrogate Rule 1(b), but instead add the following at the end of the rule: "except as authorized by an Act of Congress permitting the promulgation of rules affecting the jurisdiction of the courts of appeals."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal, because Rule 1(b) "has never been true, given Rule 4 (and a few others)."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not oppose the proposal, but warns that it would have serious reservations about any future attempt by any of the rules committees "to weaken the final-decision rule or to enlarge the categories in which interlocutory appeals now are allowed."

The **National Association of Criminal Defense Lawyers** (00-AP-019) regards the proposed abrogation of Rule 1(b) as "undesirable, because of the probability of unintended consequences in other areas." It suggests that, instead of abrogating Rule 1(b), the Advisory Committee should insert the phrase "Except as expressly authorized by statute" at the beginning of the rule.

The Association's particular concern is the alleged conflict between Rule 4(b)(1)(B) — which permits the government to file an appeal in a criminal case within 30 days after entry of the order being appealed — and 18 U.S.C. § 3731 — which requires the government

to file an appeal in a criminal case within 30 days after the challenged order "has been rendered." Because "rendered" means "announced" rather than "entered," and because § 3731 is jurisdictional, Rule 4(b)(1)(B) is "presently invalid" as it extends the jurisdiction of the courts of appeals. The Association is concerned that "[r]epeal of Rule 1(b) could . . . be interpreted to mean that the Conference thinks Rule 4(b)'s timing language now extends the jurisdiction of the court of appeals."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be

filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

* * * * *

Committee Note

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued

availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim.

P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

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1. Recommendation

The Committee proposes to add a new Rule 4(a)(1)(C) to provide that an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) and not by the time limitations of Rule 4(b) (which apply in criminal cases).

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects that "[t]his new text . . . is not parallel to subsections (A) and (B) of Rule 4(a)(1)." He recommends eliminating subsection (C) and instead amending the first sentence of Rule 4(a)(1) to begin "In a civil case (including coram nobis) . . . ." More broadly, Judge Easterbrook objects to amending Rule 4 to specifically address coram nobis cases: "Why deal separately with a single kind of motion — and an abolished one at that! . . . Rule 4(a) is limited to civil cases; but Rule

60(b) abolishes coram nobis in civil cases. The Committee Note tries to deal with this incongruity, but unsuccessfully."

Finally, Judge Easterbrook believes that, if the coram nobis problem is to be addressed, it should be addressed as part of a general rule that classifies the many "post-judgment motions in criminal cases that might, or might not, be deemed 'civil' and thus afforded 30 days for appeal." He suggests adding to FRAP either a general rule for classifying motions made in criminal cases — e.g., "an order formally in a criminal case is treated as civil for purposes of this rule unless it is a sentence of imprisonment or a criminal fine" — or a rule that lists various motions and classifies them as either civil or criminal. Judge Easterbrook says that the Seventh Circuit has had "no trouble classifying coram nobis as civil, but *lots* of trouble" with other motions, such as forfeiture and post-judgment motions for return of property.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) <u>regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires,</u> that party shows excusable neglect or good cause.

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Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or

during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect

with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have "different domains." *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault — excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

1. Recommendation

The Committee proposes to amend Rule 4(a)(5)(A)(ii) to provide that a district court may extend the time to file a notice of appeal upon timely motion of a party if the party shows either excusable neglect or good cause, regardless of whether the motion is filed within the unextended appeal time or within the next 30 days.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

3. Summary of Public Comments

The **United States Postal Service** (00-AP-003) agrees that Rule 4(a)(5)(A) should be amended to resolve the circuit split, but argues that the rule should endorse the view of the majority of the courts of appeals — i.e., that the good cause standard should apply to motions brought prior to the expiration of the original deadline and the excusable neglect standard should apply to motions brought after the expiration of the original deadline. As the owner or leaser of large amounts of real estate in the United States, the Postal Service "is extremely concerned with state and federal rules and statutes that determine when adjudications of disputes over title have become final." The Postal Service believes that the Committee's proposal makes it too easy for litigants to get permission to file untimely notices of appeal and thus to lengthen judicial proceedings.

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, agreeing that it reinforces the current text of the rule and promotes harmony with Rule 4(b)(4).

Judge Jon O. Newman (2d Cir.) (00-AP-008) suggests revising the Committee Note to correct two instances in which, in Judge Newman's view, the Committee Note implies that a motion for an extension can be filed *any* time after expiration of the original deadline, rather than just within 30 days. Judge Newman's suggested changes are as follows:

> Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought ~~after the expiration of the original deadline~~ during the 30 days following the expiration of the original deadline. . . .
>
> Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or ~~after the time prescribed by Rule 4(b) expires~~ during the 30 days following the expiration of the original deadline.

Committee on Federal Civil Procedure of the American College of Trial Lawyers (00-AP-010) agrees that the position of the majority of the circuits cannot be reconciled with the text of the existing rule. However, the Committee urges that "the Rule [be amended] to conform to existing practice, rather than requiring existing practice to change to conform to the amendment." The 30-day deadline for bringing appeals is extremely important, as it provides certainty to parties and attorneys. Few motions to extend

brought after the deadline expires are successful, as the excusable neglect standard is "quite strict." To permit such motions to be granted on a mere showing of good cause — that is, a showing of "neglect [that] was *not* excusable" — would introduce uncertainty and delay into appellate proceedings. "The Advisory Committee Note does not explain why, if a party's failure to act in a timely fashion is inexcusable, the prevailing adversary should be subject to upsetting what would otherwise be a final, nonappealable judgment. Nor . . . does the Advisor[y] Committee explain just what good cause is intended to convey in a circumstance in which the party has inexcusably failed to file a motion to extend within the original 30-day period."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) does not object to the substance of the proposal, but finds it awkwardly worded. Judge Easterbrook complains that the rule, as drafted, takes the form: "The district court may extend the time if (a) a party so moves; and (b) regardless of whether the motion is filed at time T, then condition B holds." Such a structure — "A and, regardless whether T, then B" — is, Judge Easterbrook says, non-parallel and hard to follow. He suggests that the text of Rule 4(a)(5)(A) be left alone and that a new provision be added, either as an unnumbered paragraph or as a new subsection (B) (necessitating the renumbering of current subsections (B) and (C)).

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal, although it regrets that the proposal is necessitated by the failure of courts to apply the rule as written.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) agrees that Rule 4(a)(5)(A) should be amended to

resolve the circuit split, but argues that the rule should endorse the view of the majority of the courts of appeals — i.e., that the good cause standard should apply to motions brought prior to the expiration of the original deadline and the excusable neglect standard should apply to motions brought after the expiration of the original deadline. Failing that, the Committee urges that the Committee Note be expanded to explain the difference between the good cause and excusable neglect standards, and to explain how the good cause standard could apply to "post-expiration" motions and how the excusable neglect standard could apply to "pre-expiration" motions.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when ~~it~~ the judgment or order is entered in ~~compliance with Rules 58 and~~ the civil docket under

Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does

not affect the validity of an appeal from that judgment or order.

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Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter

"camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which post-judgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order — or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59 — ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order

entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds*, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a post-judgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final

decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil

docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

1. Recommendation

The Committee proposes to amend Rule 4(a)(7) to resolve several circuit splits over questions that arise when a party seeks to appeal a judgment or order that is required to be set forth on a separate document but is not. In conjunction with concurrently proposed amendments to FRCP 58, the amendment to Rule 4(a)(7) would provide the following: (1) Orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be set forth on separate documents. (2) When proposed FRCP 58 requires a judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. (3) An appellant may waive the separate document requirement and appeal an otherwise appealable judgment or order, even if the appellee objects. (4) An appellant may choose to waive the separate document requirement more than 30 days (60 days if the government is a party) after entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not.

2. Changes Made After Publication and Comments

No changes were made to the text of proposed Rule 4(a)(7)**(B)** or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A) — one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Rule 4(a)(6)(A). It hardly seems fair to give a party who *does* receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of the time to appeal. Sending appellate lawyers to the civil rules to discover when time

began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when . . . ."

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the *appellate* rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain *civil* rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of *these Rules* when . . . ." In addition, Rule 4(a)(7)(A) was redrafted[1] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

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[1] A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft without objection.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In *substance*, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap — a change that was suggested by some of the commentators and that makes the cap more forgiving.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) opposes proposed Rule 4(a)(7)(B), as he believes that it creates "an open window for evasion and possible concealment."

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) commented only on the 60-day provision — that is, the amendment to FRCP 58 that provides that a judgment or order required to be set forth on a separate document will be deemed "entered" when it is so set forth or 60 days after it is entered in the civil docket, whichever occurs first. The Association believes that the current separate document requirement protects parties from inadvertently losing their rights to appeal "by putting the losing party firmly on notice that a final and appealable judgment had been entered." The Association opposes any weakening of the separate document requirement.

The Association expressed sympathy with this Committee's desire to address the time bomb problem, but suggests that better alternatives exist: (1) Encourage district court judges and clerks to comply with the separate document requirement. If judges and clerks would simply enter judgments and orders on separate documents, the time bomb problem would disappear. (2) Amend the appellate and civil rules to provide that the prevailing party can start the time to appeal running on a judgment or order that was not entered on a

separate document by serving notice of the entry of that judgment or order on the other parties. (3) Amend FRCP 58 as proposed, but lengthen the 60-day "safe harbor" to at least 180 days. A 6-month hiatus in court proceedings is sufficiently rare that it would provide fair notice to litigants that "the case is over at the District Court level and . . . the time for appeal has arrived."

The **Public Citizen Litigation Group** (00-AP-005) supports some of the proposed amendments to Rule 4(a)(7) and FRCP 58 and opposes others:

1. The Group supports Rule 4(a)(7). It agrees that Rule 4 should be amended to make clear that the appellate rules do not impose a separate document requirement of their own, but simply incorporate the separate document requirement of the civil rules.

2. The Group does not support amending FRCP 58 to provide that orders disposing of post-trial motions do not have to be entered on a separate document. The Group confesses that it finds this a "close question," as orders disposing of post-judgment motions "are generally discrete and imbued with finality" and thus provide notice to the losing parties that the time to appeal is running. However, in some complex cases involving multiple parties and claims and in some cases involving requests for attorneys' fees, the "finality" of a post-judgment order may not be as apparent. The Group urges that, even if the Committee goes forward with the proposed amendment, it should make clear that the separate document rule is retained for orders that dispose of motions other than those listed in proposed FRCP 58(a)(1). The Group would, however, support an amendment to FRCP 58 that would clarify that an order appealable under the collateral order doctrine does not need to be entered on a separate document.

3. The Group strongly disagrees with the 60-day provision, which, it says, "is at odds with the most valuable purpose of the separate-document rule" — its "signaling function." The Group argues that the purpose of the separate document requirement is to give parties fair notice that the time to appeal has begun to run, so that parties will not inadvertently lose their rights to appeal. The Group believes that it makes no sense to "retain the separate-document requirement and then allow it to evaporate at some point after an appealable order is entered." The Group argues that, "in the ordinary case where the losing party has notice of the relevant order (but no separate document has been entered), and does not appeal within 30 days of the entry of that order, the mere passage of an additional 60 days generally will not alert the losing party that an appeal is necessary if that party was unaware beforehand."

As to the time bomb problem, the Group makes several comments: (a) The easiest way to eliminate the time bomb problem is for district court judges and clerks to simply enter judgments and orders on separate documents, which is not difficult. (b) The time bomb problem can also easily be avoided by the winning party, who can move for entry of the judgment or order on a separate document. (c) Although the Group concedes that there are a large number of published decisions addressing the failure to enter a judgment or order on a separate document, it does not believe that the time bomb problem is significant and, in any event, it believes that the number of cases involving time bombs are dwarfed by the number of cases "in which potential appellants are well served by the signaling function of FRCP 58." (d) Cases in which appeals are not brought until long after the judgment or order is entered "generally are cases of genuine ambiguity as to whether the underlying order is 'final' for purposes of appeal."

4. The Group supports proposed Rule 4(a)(7)(B). It agrees that the decision whether to waive the separate document requirement should be the appellant's alone, and it agrees with the rejection of *Townsend*'s holding. The Group points out, though, that the rejection of *Townsend* will have only limited practical consequences if the 60-day provision is retained.

Prof. Bradley Scott Shannon (00-AP-007) submitted a lengthy and complicated comment. He acknowledges the seriousness of the problems addressed by the amendments to Rule 4 and FRCP 58; in fact, he argues that "[d]ramatic reform in this area is desperately needed."

The thrust of Prof. Shannon's comment is that the problems that concern the Advisory Committee are rooted not in the separate document requirement of FRCP 58, but in the manner in which "judgment" is defined in FRCP 54(a). FRCP 58 requires that every "judgment" be entered on a separate document. According to Prof. Shannon, district court judges and clerks are aware of this requirement and try to comply with it. The problem is in deciding when the court has issued a "judgment." Under FRCP 54(a), whether a court action is a "judgment" turns upon whether that action is appealable, and ascertaining the appealability of court actions is often extremely difficult. In short, the reason for the widespread non-compliance with FRCP 58 is that judges and clerks often guess wrong in trying to ascertain whether a court action is appealable, and thus a "judgment" for purposes of FRCP 54(a).

Prof. Shannon discusses other problems with the way FRCP 54(a) defines judgment. He argues, for example, that court proceedings can be terminated with orders that are final but are not appealable. In such cases, nothing denominated a "final judgment" is ever entered on a separate document.

The Committee Note to the amendment to FRCP 58 acknowledges that a literal application of FRCP 54(a) would create "many horrid theoretical problems" that could be solved only by "[d]rastic surgery on Rules 54(a) and 58." The Civil Rules Committee declined to undertake such "[d]rastic surgery," as it believes that these theoretical problems "seem to have caused no real difficulty" in practice.

Prof. Shannon disagrees with the Committee. As noted, he believes that, among other problems, the definition of "judgment" in FRCP 54(a) creates the time bomb problem. Although Prof. Shannon "understand[s]" the Committee's "caution" in employing an "incremental approach," he urges a wholesale revision of FRCP 54(a). In particular, he urges that whether an order is defined as a "judgment" under FRCP 54(a) — and thus must be entered on a separate document under FRCP 58 — should turn not on whether the order is *appealable*, but on whether the order is *final*. Prof. Shannon cites as among the advantages of this approach the fact that ascertaining finality would be easier than ascertaining appealability. He also argues that his approach would assure that the *conclusion* of every civil action (the entry of a separate document entitled "final judgment") would be as clearly delineated as the *commencement* of every civil action (the filing of a complaint).

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** (00-AP-011) expresses no opinion on Rule 4(a)(7) specifically, but recommends changes to the proposed amendments to FRCP 58. The Committee is concerned that, as drafted, new FRCP 58 will lead parties to believe that the time to appeal does not begin to run on an appealable order until the order is entered on a separate document. The Committee fears that this will result in the inadvertent loss of appellate rights by parties who believe that, as

long as an order is not entered on a separate document, it does not have to be appealed. The Committee also fears that this will result in district courts being deluged by requests from winning parties to enter all orders on separate documents — even orders to which the separate document requirement does not apply — to ensure that the time to appeal begins to run.

The Committee proposes a redraft of FRCP 58. The redraft of FRCP 58(a) provides that only a judgment "that terminates a district court action" must be set forth on a separate document, and explicitly provides that "[a]ppealable interlocutory orders, partial judgments certified pursuant to FRCP 54(b), and appealable post-judgment orders do not require a separate document." The redraft of FRCP 58(b) adds language providing that, in cases in which a separate document is *not* required but nevertheless entered, the judgment will be deemed "entered" upon the later of (1) the entry date of the judgment or (2) the entry date of the separate document.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) seems to have two major concerns about the proposed revisions to Rule 4(a)(7)(B).

First, Judge Easterbrook objects to the use of the word "validity." He states that appeals can be "proper" or "effective," but not "valid." He also contends that "the point of this change is not that notices of appeal are valid, but that particular decisions are deemed *final*, and it is finality that makes an appeal proper."

Second, Judge Easterbrook essentially opposes the 60-day provision and favors retaining the separate document requirement as it exists. He argues that, without the warning provided by a separate document, some litigants will fail to recognize that the time to appeal has begun to run and find themselves "hornswoggled out of their

appeals." He argues that other litigants will "pepper courts of appeals with arguments that one or another decision marked the 'real' end of the case, so that the clock must be deemed to have started more than 30 days before the notice of appeal." Still other litigants will "bombard[] the court with notices of appeal from everything that might in retrospect be deemed a conclusive order."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-13) opposes the 60-day provision, because of the possibility that litigants could find themselves foreclosed from being able to appeal without the "readily defined trigger" provided by the separate document requirement. As to the time bomb problem that the 60-day provision eliminates, the Section has three comments: (1) the problem would not exist if district courts would simply comply with the separate document requirement; (2) winning litigants can always protect themselves against time bombs by moving to have the judgment or order entered on a separate document; and (3) the Section questions "whether there are actually enough 'problem' cases to justify adoption of a 60-day rule."

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) "heartily endorses" the proposal, which, it believes, will provide "greater certainty" in an area that is now "fraught with peril and confusion."

Michael Zachary, Esq. (00-AP-015), a supervisory staff attorney for the Second Circuit, does not object to the proposed changes to FRAP 4(a)(7), but has three concerns about the proposed changes to FRCP 58:

First, Mr. Zachary states that proposed FRCP 58(b) "appears to establish a new benchmark for determining a judgment's entry date: the date it is 'set forth' in a separate document, as opposed to the date

of entry in the civil docket." He complains that "set forth" is ambiguous; it is "not defined anywhere" and it could be interpreted to refer to "the date the separate document is written, or the date it is signed by a judge or clerk of court, or the date it is filed or entered."

Second, Mr. Zachary argues that the use of the word "it" in proposed FRCP 58(b)(1) is ambiguous, as the word "appears to refer to a 'judgment' in a situation where no document labeled 'judgment' will exist. The relevant document will be an order, which the subsection then deems to be a judgment for judgment entry purposes."

To meet these two concerns, Mr. Zachary recommends that FRCP 58(b) be amended as follows:

> **(b) Time of Entry.** Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:
>
> (1) when ~~it~~ the order disposing of the motion is entered in the civil docket under Rule 79(a), and
>
> (2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:
>
> (A) when ~~it is set forth on a separate document~~ the separate document is entered in the civil docket under Rule 79(a), or
>
> (B) when 60 days have run from entry on the civil docket under Rule 79(a).

Finally, Mr. Zachary opposes the 60-day provision because "although it prevents reactivation of dormant cases, it will return us,

in part, to the pre-1963 problem of litigants unfairly losing their right to appeal when the order terminating the case is not clear or when certain types of motions which do not affect finality are still pending." He also fears that the provision will give litigants an incentive to file a notice of appeal from every order that, although not entered on a separate document, might have been intended by the district court to terminate the case. Finally, he does not think that the time bomb problem is serious. He has not seen many time bombs in his work for the Second Circuit, and winning litigants can easily protect against time bombs by asking the court to enter judgment on a separate document.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) objects only to the 60-day provision. It has no objection to the remainder of the Rule 4(a)(7)/FRCP 58 proposal, including the provisions that would make clear that the appellant alone can waive the separate document requirement and that orders disposing of certain post-judgment motions need not be entered on separate documents. The Committee does note, though, that it would prefer that FRCP 58 instead provide that *all* orders disposing of post-judgment motions be entered on separate documents.

As to the 60-day provision, the Committee believes that it undermines the fundamental purpose of the separate document requirement, which is to provide litigants with a clear warning of when a judgment has been issued and the time to appeal has begun to run. The Committee concedes that the time bomb problem is "a real concern," but winning litigants can easily protect themselves from time bombs simply by asking the district court to enter judgment on a separate document.

The **Litigation Section and the Courts, Lawyers, and the Administration of Justice Section of the District of Columbia Bar** (00-AP-018) support proposed FRCP 58(a), which would make clear that orders disposing of certain post-trial motions need not be entered on separate documents. However, the Sections oppose the 60-day provision of proposed FRCP 58(b), which, they believe, would leave litigants without clear notice that judgment has been entered and the time to appeal has begun to run. The Sections argue that the solution to the time bomb problem is to clarify the separate document requirement so that district court judges and clerks will comply with it more often. Specifically, the Sections recommend that the following sentence be added to new FRCP 58(b): "If a separate document is required by Rule 58(a)(1), only entry of the separate document shall constitute entry of the judgment." The Sections also recommend that language be added to FRCP 58 making it clear that parties may move the court to set forth a judgment on a separate documents (when the court neglects to do so), and that the court must grant such a motion.

The Sections urge that proposed Rule 4(a)(7)(B) be deleted, based upon the Sections' understanding that it, like proposed FRCP 58(b), would "eliminate the requirement for entry of a separate document of judgment as a basis for appeal."

The **Conference of Chief Bankruptcy Judges of the Ninth Circuit** (00-CV-004) "wholeheartedly supports" the proposed amendments to FRCP 54 and 58.

The **Federal Magistrate Judges Association** (00-CV-006) supports the proposed amendments to FRCP 54 and 58, which would "help clarify requirements that have been ignored in many cases" and "establish[] a basis for insuring that appeal time does not go on indefinitely."

William J. Borah, Esq. (00-CV-012) opposes the proposed amendments to FRCP 54 and 58, which, he believes, would "make the whole issue even more confusing and complicated." He thinks it "would not be a bad idea" to abandon the separate document requirement altogether.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the 60-day provision, although it urges that Rule 4(a)(7) and FRCP 58(b) be rewritten to make them easier to follow. In particular, the Committee recommends that FRCP 58(b) should make clear that a judgment that is required to be set forth on a separate document is not "entered" until it is *both* set forth on a separate document *and* entered in the civil docket.

Rule 4. Appeal as of Right — When Taken

* * * * *

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. <u>The filing of a motion</u>

under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

* * * * *

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(a) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g., United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(a) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any

mention of a Fed. R. Crim. P. 35(a) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(a), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

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1. Recommendation

The Committee proposes to amend Rule 4(b)(5) to provide that the filing of a motion to correct a sentence under FRCrP 35(a) does not toll the time to appeal the judgment of conviction.

2. Changes Made After Publication and Comments

The reference to Federal Rule of Criminal Procedure 35(c) was changed to Rule 35(a) to reflect the pending amendment of Rule 35. The proposed amendment to Criminal Rule 35, if approved, will take effect at the same time that the proposed amendment to Appellate Rule 4 will take effect, if approved.

3. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) does not oppose the proposal in substance, but he thinks that Rule 4(b)(5) — which "breaks up a single thought into three long phrases" — should be restyled in its entirety. He suggests: "Neither the filing of a motion under Fed. R. Crim. P. 35(c) nor the disposition of such a motion affects the proper time to file a notice of appeal, and the filing

of a notice of appeal does not affect the district court's power to act on such a motion." Judge Easterbrook concedes that his proposal "leaves open the question whether a new (or amended) notice of appeal is necessary if the district court modified the judgment under Rule 35(c)" and "may leave an unintended negative implication about the status and effect of other post-judgment motions in criminal cases."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) supports the proposal. However, the Section requests that Rule 4(b) be further amended to give prosecutors and defendants the same amount of time — 30 days — to bring appeals in criminal cases.

The **National Association of Criminal Defense Lawyers** (00-AP-019) agrees that Rule 4(b)(5) should be amended to resolve the circuit split, but urges that the split be resolved differently. "Rule 35(c) motions should be treated the same way the rules treat other motions to amend a judgment — as terminating the appeal time, with a new ten days commencing upon entry of the order on the motion. . . . At the least, the rule should provide that if a timely motion to correct a sentence is filed under Rule 35(c), the time to appeal does not commence until the later of (i) the date the motion is ruled upon, or seven days after imposition of sentence (when the court's power to act expires under that rule), whichever comes first, or (ii) the entry of judgment." The Association argues that, in some cases, a defendant may not file a notice of appeal if his or her concern can be addressed through a FRCrP 35(c) motion; the defendant should not have to decide whether or not to appeal "until the final contours of the sentence are settled." Also, as the last paragraph of the Committee Note acknowledges, the revised Rule 4(b)(5) would require two notices of appeal to be filed in some cases.

The Association further urges that Rule 4(b)(1)(B)(i) be amended to resolve a conflict between the rule and 18 U.S.C. § 3731. That conflict is described above, in the summary of the Association's comments about the proposed abrogation of Rule 1(b).

Members of the **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) disagree about the proposal. Some support it. Others propose that Rule 4(b)(5) be amended so that FRCrP 35(c) motions toll the time to appeal, but only until the court disposes of the motion or the 7-day period expires, whichever is earlier. These members point out that all circuits agree that a FRCrP 35(c) motion tolls the time to appeal; the circuits simply disagree about the length of that tolling period. Proposed Rule 4(b)(5), by contrast, would provide that a FRCrP 35(c) motion does not toll the time to appeal at all.

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed

unless the court requires a different number by local rule or by order in a particular case.

* * * * *

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

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1. Recommendation

The Committee proposes to amend Rule 5(c) to correct a typographical error in a cross-reference and to impose a 20-page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, although it urges that the limitation on the length of Rule 5 papers be expressed in words rather than pages. It suggests that Rule 5 papers be limited to 5,600 words. (Dividing the old 50 page limit for briefs into the new 14,000-word limit for briefs results in a calculation of 280 words per page; 20 pages multiplied by 280 words is 5,600 words.) The Group also suggests that typeface requirements (similar to those applied to briefs in Rule 32(a)(5)) be imposed on Rule 5 papers.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) urges that any limit on the length of Rule 5 papers be expressed in words rather than pages, to remove the incentive for counsel to play games with type size and line spacing. He suggests 5,600 words (for the same reason as the Public Citizen Litigation Group) "or, to be generous, 6,000 words."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose placing a limit on Rule 5 papers, but believes that the limit should be expressed in words, rather than in pages.

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) does not oppose placing limits on Rule 5 papers, but stresses that 20 pages will be insufficient in some complex cases, and recommends that the circumstances under which

a court will grant permission to exceed the 20-page limit should be specified. At present, the proposal says only that the limit can be exceeded with "the court's permission"; it says nothing about when such permission should be granted. The Committee suggests that a "good cause" standard be incorporated into the rule — "including a list of factors that might warrant relief from the 20-page limit."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 15(f)

The Committee proposed to add a new Rule 15(f) to provide that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing or similar petition with the agency, any petition for review or application to enforce that non-reviewable order would be held in abeyance and become effective when the agency disposes of the last such review-blocking petition. Proposed Rule 15(f) was modeled after Rule 4(a)(4)(B)(i) and was intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions. The Committee voted to defer action on this proposal in light of the strong opposition of the Advisory Committee on Procedures for the D.C. Circuit. The Committee hopes to meet with the chief judge and clerk of the D.C. Circuit about those objections.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

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1. Recommendation

The Committee proposes to amend Rule 21(d) to correct a typographical error in a cross-reference and to impose a 30-page limit on petitions for extraordinary relief (such as mandamus) and answers to those petitions.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that the page limit was increased from 20 pages to 30 pages. The Committee was persuaded by some commentators that petitions for extraordinary writs closely resemble principal briefs on the merits and should be allotted more than 20 pages.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, although it urges that Rule 21 papers be limited to 5,600 words instead of 20 pages.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** opposes the proposal, insofar as it limits Rule 21 papers to 20 pages. "Twenty pages is not enough for extraordinary writs," which are submitted "in extraordinary situations" and "under extreme time pressure without the luxury of close editing." The

Committee recommends that, if Rule 21 papers are to be limited, they be limited to 14,000 words, as are principal briefs under Rule 32(a)(7)(B).

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) urges that any limit on the length of Rule 21 papers be expressed in words rather than pages, to remove the incentive for counsel to play games with type size and line spacing. He suggests 5,600 words.

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose placing a limit on Rule 21 papers, but believes that the limit should be expressed in words, rather than in pages.

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) is "greatly concerned" about the proposed 20-page limit on Rule 21 papers. Petitions for extraordinary relief often must "set[] forth a complicated factual or procedural background" or "survey[] a voluminous body of cases in a rapidly evolving and complex area of law." In addition, some circuits require counsel petitioning for extraordinary relief "to address a whole list of independent factors required to justify extraordinary relief." Given that 20 pages will often be insufficient, the Committee urges that the circumstances under which a court should grant permission to exceed the limit should be set forth in detail.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not oppose placing a limit on Rule 21 papers but urges that, because such papers are similar to principal briefs filed in ordinary appeals, the limits expressed in Rule 32(a)(7) should apply.

The **National Association of Criminal Defense Lawyers** (00-AP-019) does not oppose placing a limit on Rule 21 papers, but argues that the 20-page limit is "too short," and that the limit should be stated in words, not in pages. It recommends a limit of 9,500 words, "about 35 pages of traditional 12 point Courier type." "A mandamus petition has more in common with a brief on the merits than it does with most appellate motions," and therefore the limit should be longer than that applied to motion papers. At the same time, "it is the rare mandamus petition that involves more than one issue," and therefore the limit should be shorter than that applied to briefs. The Association believes that 9,500 words is "a reasonable compromise."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal

case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis~~. In that event, the district court must~~ and state<u>s</u> in writing its reasons for the certification or finding<u>; or</u>

<u>(B) a statute provides otherwise</u>.

* * * * *

Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) has provided that, after the district court grants a litigant's motion to

proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) has provided that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g.*, *Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute.

1. Recommendation

The Committee proposes to amend Rule 24(a) — which governs the ability of parties to proceed in forma pauperis on appeal — to eliminate apparent conflicts with the Prison Litigation Reform Act of 1995.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that "a statute provides otherwise" was substituted in place of "the law requires otherwise" in the text of the rule and conforming changes (as well as a couple of minor stylistic changes) were made to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) has two objections to the proposal. First, he does not agree that the PLRA and Rule 24(a) conflict, and he complains that "[t]he Committee Note does not cite the portion of the PLRA that it perceives to be in conflict with Rule 24(a)(2)." Second, he argues that, even if there is a conflict, it is not necessary to amend Rule 24(a). The PLRA was enacted after the pre-restylized Rule 24(a), and thus the PLRA "trumps" anything in Rule 24(a). The enactment of the restylized Rule 24(a) in 1998 should not change this result, as "all of the non-substantive changes made in 1998 contain Committee Notes with a no-change-intended clause, which should be enough to keep § 2072(b) out of the picture." Finally, he objects to the phrase "the law requires otherwise." He argues that the clause should instead

read "a statute requires otherwise" (as the appellate rules are themselves "laws") and, in any event, that the clause is unnecessary — again because "[a] more recent statute always overrides the rules."

The **National Association of Criminal Defense Lawyers** (00-AP-019) has several comments:

1. In Rule 24(a)(1)(A) (which is not affected by the proposed amendments), a comma should be inserted after "shows" or the comma that appears after "Forms" should be deleted.

2. In Rule 24(a)(2), "an introductory 'Except as otherwise expressly provided by statute,'" should be substituted for the "unnecessarily imprecise" phrase "unless the law requires otherwise." The Association points out that "the law" might be "understood to include circuit precedent, for example."

3. The Association argues that Rule 24(a)(3) — both as it now exists and as amended — conflicts with the Criminal Justice Act ("CJA"). The present version of Rule 24(a)(3) provides that a party who was permitted to proceed IFP in the district court "or who was determined to be financially unable to obtain an adequate defense in a criminal case" may automatically proceed IFP on appeal, with two exceptions: The party may not proceed IFP on appeal (a) if the district court finds that the appeal is not taken in good faith, or (b) if the district court finds that the party is no longer indigent. The proposed amendment to Rule 24(a)(3) would add a third exception — if "the law requires otherwise" — a reference to the fact that the PLRA does not permit "automatic" IFP status on appeal in the cases to which the PLRA applies.

The Association argues that, in the context of *direct appeals from criminal cases*, these exceptions conflict with the CJA. Under

18 U.S.C. § 3006A(d)(7), defendants who are "determined to be financially unable to obtain an adequate defense in a criminal case" (to quote Rule 24(a)(3)) are permitted to appeal "without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." The CJA does not give district courts any authority to disallow IFP status in direct appeals in criminal cases when the courts deem the appeals "not taken in good faith." If a district court finds that a defendant is no longer indigent, it can terminate the appointment of counsel under 18 U.S.C. § 3006A(c). And the PLRA does not apply at all to criminal cases. In other words, the first exception in Rule 24(a)(3) conflicts with the CJA, the second exception is unnecessary, and the third exception is inapplicable. Thus, Rule 24(a)(3) should be amended to make it clear that it does not apply to direct appeals in criminal cases; "[e]ither a new Rule 24(a)(4) reflecting the applicable provisions of the CJA should be inserted, or the matter of criminal cases should be entirely removed from the rule and left to statutory regulation."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, except that it recommends that the amendment refer to "a statute" rather than to "the law."

Rule 25. Filing and Service

* * * * *

(c) Manner of Service.

(1) Service may be <u>any of the following:</u>

<u>(A)</u> personal, <u>including delivery to a responsible person at the office of counsel;</u>

(B) by mail~~, or~~ ;

(C) by third-party commercial carrier for delivery within 3 calendar days~~.~~ ; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) ~~Personal service includes delivery of the copy to a responsible person at the office of counsel.~~ Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

* * * * *

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Parties also have the flexibility to define the terms of their consent; a party's consent to electronic service does not have to be "all-or-nothing." For example, a party may consent to service by facsimile transmission, but not by electronic mail; or a party may consent to electronic service only if "courtesy" copies of all transmissions are mailed within 24 hours; or a party may consent to electronic service of only documents that were created with Corel WordPerfect.

Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon

transmission: If the sender is notified — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

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1. Recommendation

The Committee proposes to amend Rule 25(c) to authorize parties to use electronic means to serve other parties who have consented to electronic service, to permit parties to use the court's transmission facilities to make electronic service (when authorized by local rule), and to define when electronic service is complete. In addition, the Committee proposes to reorganize and subdivide Rule 25(c) to make it easier to understand.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. A paragraph was added to the Committee Note to clarify that consent to electronic service is not an "all-or-nothing" matter.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) generally supports the electronic service rules, but raises three concerns:

1. What does it mean to say that a party must consent "in writing"? Does an exchange of e-mail suffice? Must there be a "hard

copy" writing with an original signature? Does the consent, in whatever form, have to be filed with the court?

2. Parties should be required to serve and file a hard copy of every document that is served electronically. A document that is attached to an e-mail will be paginated differently for every recipient who opens and prints it, due to differences among e-mail and word processing programs and printers. Thus, if the parties and the court are to be able to refer to the particular page of a document, hard copies of that document will have to be served and filed.

3. There is an inconsistency between the proposed rules — which seem to envision that electronic service can serve as the sole means of serving a document — and Rule 31(b) — which requires that two copies of briefs be served on every party. The Committee should either require that parties serve hard copies of every electronically served document (as suggested above) or amend Rule 31(b) to eliminate the two-copy requirement when electronic service is used.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** (00-AP-011) believes that several issues need to be clarified: (1) The Committee suggests that the proposed rule should "explain the difference between non-receipt of a message (it never got there) as opposed to a message that has yet to be read (the automated 'I'm out of the office' messages)." (2) The Committee also seeks clarification about "what a litigant is required to tell the court; if a party notified the court that he served a document by e-mail and then found out it didn't get there, is he required to provide the court with that update or tell the court what he did thereafter?" (3) The Committee asks what "steps or obligations" are triggered when

"a document is served by e-mail, but it cannot be read by the recipient due to formatting or other problems?"

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) is "enthusiastic" about the electronic service rules, but he objects to requiring consent "in writing." "The implication of Rule 25(c)(1)(D) that agreement must be recorded on paper before the parties may move forward electronically is incompatible with [the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., which permits people to make and "sign" agreements electronically]. Let people signify their agreement in whatever way they find satisfactory."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) generally supports the electronic service rules, but urges that "the proposed amendment [be] modified to require that electronic service be accompanied by traditional service of a hard copy of the document." The Section is concerned that, unlike service by mail or hand, electronic service will "generally go straight to an attorney's computer" rather than be "channeled through support staff." If an attorney is away from the office for several days, no one may discover that a document has been served, and a deadline to respond to the document may pass. The Section concedes that attorneys could avoid this problem by, for example, forwarding their e-mail to support staff or activating an automatic reply feature which informs senders that their e-mails will not be read until a particular date. However, "not all attorneys have access to this technology or know of its availability." The Section also is concerned about the pagination problem described by the Public Citizen Litigation Group.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the electronic services rules, but stresses that it is critical that electronic service only be allowed if the recipient consents in writing. Electronic service will raise many issues, such as what happens when an attachment can't be opened or when each recipient's copy of a brief is paginated differently. For these reasons, "[a]dvance consent is essential."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, although it suggests that language be added to the Committee Note to clarify that consent to electronic service is not an "all-or-nothing" affair. Parties should be able to define the terms of their consent; for example, they should be able to consent to service by fax but not by e-mail. The Committee also asks how a party served electronically will know that a paper has been signed under proposed Rule 32(d) (the Committee suggests requiring a "certificate of signature") and asks when service will be deemed complete in the situation in which service does not completely fail, but is simply delayed for a few days, and the serving party is made aware of that delay.

Rule 25. Filing and Service

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(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail~~ing~~ or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

* * * * *

Committee Note

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served electronically, the proof of service of that paper must include the electronic address or facsimile number to which the paper was transmitted.

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1. Recommendation

The Committee proposes to amend Rule 25(d) to require that a proof of electronic service must state the electronic address or facsimile number of the party served.

2. Changes Made After Publication and Comments

The text of the proposed amendment was changed to refer to "electronic" addresses (instead of to "e-mail" addresses), to include "facsimile numbers," and to add the concluding phrase "as appropriate for the manner of service." Conforming changes were made to the Committee Note.

3. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects to the phrase "mail or e-mail addresses." He points out that "[e]-mail is just one means of exchanging information." Litigants may, for example, "post information on each other's web or FTP sites." Judge Easterbrook suggests substituting "physical or electronic addresses."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) suggests that "facsimile numbers" be added after "e-

mail addresses" and that "as appropriate for the method of service" be added at the end of the subdivision.

Rule 26. Computing and Extending Time

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(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has

been served until two or three days later. Finally, extending the "3-day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

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1. Recommendation

The Committee proposes to amend Rule 26(c) to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period after service, 3 calendar days are added to the prescribed period.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Roy H. Wepner, Esq. (00-AP-006) did not take a position on the proposed amendment to Rule 26(c), but, in commenting on the proposed amendment to Rule 26(a)(2), described an ambiguity in the way the two rules intersect. (See Mr. Wepner's comments on Rule 26(a)(2), summarized below.)

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects to extending the 3-day rule to electronic service, which, he says, will "slow[] litigation down." He argues that one of the reasons cited in

the Committee Note — the possibility of "technical problems" — can also occur in hand delivery (e.g., a law firm's receptionist or mail room may fail to get a hand-delivered package to a lawyer). The 3-day rule does not apply to hand delivery, and Judge Easterbrook believes that electronic service should be treated likewise.

Even if the 3-day rule is to be applied to electronic service, Judge Easterbrook suggests that the last sentence of Rule 26(c) be rewritten to state simply: "For purposes of this Rule 26(c), electronic service is treated the same as service by mail." As drafted, Judge Easterbrook says, the last sentence of Rule 26(c) "is phrased in the negative and will leave many readers scratching their heads."

Most members of the **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) oppose extending the 3-day rule to electronic service. The government attorneys on the Committee support the proposal.

Rule 36. Entry of Judgment; Notice

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(b) Notice. On the date when judgment is entered, the clerk must ~~mail to~~ serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

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1. Recommendation

The Committee proposes to amend Rule 36(b) so that the clerk may use electronic means to serve a copy of an opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to electronic service.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 45. Clerk's Duties

* * * * *

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party ~~to the proceeding~~, with a copy of any opinion, and must note the ~~mailing~~ date of service on the docket. Service on a party represented by counsel must be made on counsel.

* * * * *

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

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1. Recommendation

The Committee proposes to amend Rule 45(c) so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to electronic service.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than ~~7~~ 11 days, unless stated in calendar days.

9 * * * * *

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Rule 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

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1. Recommendation

The Committee proposes to amend Rule 26(a)(2) to provide that, in computing deadlines under FRAP, intermediate Saturdays, Sundays, and legal holidays should be excluded when computing deadlines under 11 days but should be counted when computing deadlines of 11 days and over. At present, time is computed one way

under the appellate rules and another way under the rules of civil and criminal procedure; the amendment would eliminate that disparity.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the proposal.

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Roy H. Wepner, Esq. (00-AP-006) "heartily concur[s]" with the proposal, but urges the Committee to address an ambiguity in the way Rule 26(a)(2) interacts with Rule 26(c). Under amended Rule 26(a)(2), the question whether intermediate Saturdays, Sundays, and legal holidays are counted in calculating a deadline will turn on whether the deadline is less than 11 days. The ambiguity is this: In deciding whether a deadline is less than 11 days, should the court first count the 3 days that are added to the deadline under the 3-day rule of Rule 26(c)? (Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.") Or should the court add those 3 days only after it first calculates the deadline under Rule 26(a)(2)?

A lot turns on the issue. Suppose that, on the face of a rule, a party has 10 days to respond to a paper that has been served by mail. If the 3 days are added to the deadline before asking whether the

deadline is less than 11 days for purposes of Rule 26(a)(2), then the deadline is not less than 11 days, intermediate Saturdays, Sundays, and legal holidays do count, and the party has 13 calendar days from the date of service to respond (unless the 13th day falls on a weekend or holiday). If the 3 days are not added to the deadline before asking whether the deadline is less than 11 days for purposes of Rule 26(a)(2), then the deadline *is* less than 11 days, and intermediate Saturdays, Sundays, and legal holidays do *not* count. The party would have at least 14 calendar days to respond to the motion. If the 3 days are then added on top of that deadline, the party would have no less than 17 days to respond.

Mr. Wepner reports that there has been extensive litigation over this question. Mr. Wepner urges that any change made to Rule 26 to address this ambiguity also be made to FRCP 6, so that time is computed similarly under both sets of rules.

Judge Jon O. Newman (2d Cir.) (00-AP-008) supports the proposal, except that he "suggest[s] that this process be carried to its logical conclusion by eliminating from the appellate rules the concept of 'calendar days,' which now appears in the appellate rules, but not in the civil or criminal rules." Judge Newman expresses the belief that deadlines expressed in "calendar days" now appear "only [in] Rule 25(c) and Rule 26(c), both of which concern three-day additions for service by mail." He argues that "[s]ince the three-day provisions of civil Rule 6(e) and criminal Rule 45(e) have no 'calendar day' exception, the appellate rules also should have none."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) gives his "unqualified approval" to the proposed change to Rule 26(a)(2) and the related changes, which, he says, "are nicely done and long overdue."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports this "long overdue" change to Rule 26(a)(2). The Committee believes that FRAP could be "further improve[d]" if the concept of "calendar days" was eliminated.

The **National Association of Criminal Defense Lawyers** (00-AP-019) "strongly supports" the proposal. Given that the time for a criminal defendant to appeal is 10 days — a deadline that is currently calculated one way in the criminal rules and another way in the appellate rules — the proposal is particularly welcome to criminal defense attorneys. The proposal will "remove a source of confusion and inadvertent error . . . for some inexperienced practitioners" and "will also have the welcome effect of extending by at least two days the time for defendants to appeal in a criminal case."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an

appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

* * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

1. Recommendation

The Committee proposes to amend Rule 4(a)(4)(A)(vi) to delete a parenthetical that will become superfluous in light of the amendment to Rule 26(a)(2) (described above).

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) opposes the proposal. The Committee acknowledges that the proposal will have no practical impact, as 10-day deadlines will now be calculated identically under the civil and appellate rules, but argues that "[a] Rule 60 motion would be governed by the timing provisions of the federal civil rules, and it seems better for the federal appellate rules to say so explicitly."

Rule 27. Motions

(a) In General.

* * * * *

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 8 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~8-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10-day deadline, which means that, except when the 10-day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude

intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10-day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10-day deadline in subdivision (a)(3)(A) has been reduced to 8 days. This change will, as a practical matter, ensure that every party will have at least 10 actual days — but, in the absence of a legal holiday, no more than 12 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

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1. Recommendation

The Committee proposes to amend Rule 27(a)(3)(A) to change the time within which a party must file a response to a motion from 10 days to 8 days. This amendment is proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days.

2. Changes Made After Publication and Comments

In response to the objections of commentators, the time to respond to a motion was increased from the proposed 7 days to 8

days. No other changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) has "no objection in principle" to shortening the time to respond to a motion in light of the proposed amendment to Rule 26(a)(2). However, it points out that, under the current 10-day rule, litigants always have at least 10 actual days, whereas under the proposed 7-day rule, litigants will sometimes have only 9 actual days. The Group objects to this 1-day reduction in the time to respond to motions, particularly since "the time periods under FRAP 27 can be quite difficult to meet, especially as they apply to certain substantive motions, such as those relating to complex issues of appellate jurisdiction." The Group urges that the Committee reduce the deadline to 8 days, rather than to 7. The Group also recommends that the current 10-day rule — calculated under the amended Rule 26(a)(2) — be retained for *dispositive* motions.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose abbreviating the time to respond to a motion in light of the change in the manner in which deadlines will be calculated under amended Rule 26(a)(2). However, it urges that the deadline be reduced to 8 days, rather than 7 days, for the reasons described by the Public Citizen Litigation Group. The Section argues that busy practitioners already have difficulty meeting the current deadline of at least 10 actual days and that reducing the deadline to at least 9 actual days would create a hardship.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal, but urges that Rule 27(a)(3)(A) be clarified "to say that the response time can be shortened by order in a particular case, or by local rule with respect to a class or type of motion . . ., but not by local rule applicable to all motions."

The Association also points out that Rule 27(d)(2) now limits motions and responses to motions to "20 pages" and limits replies to "10 pages." It urges that Rule 27(d)(2) be amended to express the limits in words, rather than in pages. It also suggests that a cross-reference to Rule 32(c)(2) should be inserted into Rule 27(d)(1)(D), to remind practitioners that the typeface and type style provisions of Rule 32 apply to motion papers.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, except that it urges that the deadline be reduced to 8 days, rather than 7 days, for the reasons described by the Public Citizen Litigation Group.

Rule 27. Motions

(a) In General.

* * * * *

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

* * * * *

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, parties generally must reply to responses to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to reply to responses to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7-day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every party will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

1. Recommendation

The Committee proposes to amend Rule 27(a)(4) to change the time within which a party must file a reply to a response to a motion from 7 days to 5 days. This amendment is proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * * * *

(b) When Issued. The court's mandate must issue 7 <u>calendar</u> days after the time to file a petition for rehearing expires, or 7 <u>calendar</u> days after entry of an

order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

* * * * *

Committee Note

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

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1. Recommendation

The Committee proposes to amend Rule 41(b) to provide that the mandate of a court must issue 7 *calendar* days after the time to file a petition for rehearing expires or 7 *calendar* days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. This amendment is proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days, unless the deadline is stated in "calendar days."

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Jon O. Newman (2d Cir.) (00-AP-008) opposes the proposal. Judge Newman believes that the concept of "calendar days" should be eliminated entirely from the appellate rules. (See the

summary of Judge Newman's comments about the proposed amendment to Rule 26(a)(2).) Judge Newman argues that, "[i]f 'calendar days' cannot be eliminated entirely, at least they should not be added, as is now proposed for Appellate Rule 41(b)." As to the rationale for that change — that leaving the period at "7 days," calculated under new Rule 26(a)(2), would mean that mandates would not issue until 9 to 13 days after a triggering event — Judge Newman has three responses: (1) The harm of the added delay is not as great as the harm that would be caused by "the added confusion of 'calendar days.'" (2) The court of appeals can always shorten the time for issuing the mandate in a particular case. (3) If the 7-day period is too long, it should be shortened to 5 days, not stated in "calendar days."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) opposes the proposal. It doubts that delaying mandates for 9 or more days would cause any real harm and points out that courts always retain authority to order that their mandates issue whenever they want.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

a. Alternative One[2]

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

(A) identif~~ying~~ies ~~all its~~ any parent corporation~~s~~ and ~~listing~~ any publicly held ~~company~~ corporation that owns 10% or more of ~~the party's~~ its stock or states that there is no such corporation, and

(B) discloses any additional information that may be publicly designated by the Judicial Conference of the United States.

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[2] At its June 7-8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to reject Alternative One.

(2) **Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be publicly designated by the Judicial Conference of the United States.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental

statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

Rule 26.1(a) does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees

that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

b. Alternative Two[3]

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identif~~ying~~ies ~~all its~~ any parent corporation~~s~~ and ~~listing~~ any publicly held ~~company~~ corporation that owns 10% or more of ~~the party's~~ its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A

[3] At its June 7-8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to approve Alternative Two.

party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who have not been required to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement

is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

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1. Recommendation

The Committee proposes to amend Rule 26.1 to require a nongovernmental corporate party not only to file a disclosure statement in which it identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock (as a nongovernmental corporate party is required to do under existing Rule 26.1), but also to file a statement indicating that there are no such corporations if that is true, to include in any disclosure statement any additional information that may be required by the Judicial Conference of the United States, and to supplement any disclosure statement when circumstances warrant. The Committee also proposes to amend Rule 26.1 to require parties other than nongovernmental corporate parties to file a disclosure statement in which they disclose any information that may be required by the

Judicial Conference of the United States and to supplement any disclosure statement when circumstances warrant.

2. Changes Made After Publication and Comments

The Committee is submitting two versions of proposed Rule 26.1 for the consideration of the Standing Committee.

The first version — "Alternative One" — is the same as the version that was published, except that the rule has been amended to refer to "any information that may be *publicly designated* by the Judicial Conference" instead of to "any information that may be *required* by the Judicial Conference." At its April meeting, the Committee gave unconditional approval to all of "Alternative One," except the Judicial Conference provisions. The Committee conditioned its approval of the Judicial Conference provisions on the Standing Committee's assuring itself that lawyers would have ready access to any standards promulgated by the Judicial Conference and that the Judicial Conference provisions were consistent with the Rules Enabling Act.

The second version — "Alternative Two" — is the same as the version that was published, except that the Judicial Conference provisions have been eliminated. The Civil Rules Committee met several days after the Appellate Rules Committee and joined the Bankruptcy Rules Committee in disapproving the Judicial Conference provisions. Given the decreasing likelihood that the Judicial Conference provisions will be approved by the Standing Committee, I asked Prof. Schiltz to draft, and the Appellate Rules Committee to approve, a version of Rule 26.1 that omitted those provisions. "Alternative Two" was circulated to and approved by the Committee in late April.

I should note that, at its April meeting, the Appellate Rules Committee discussed the financial disclosure provision that was approved by the Bankruptcy Rules Committee. That provision defines the scope of the financial disclosure obligation much differently than the provisions approved by the Appellate, Civil, and Criminal Rules Committees, which are based on existing Rule 26.1. For example, the bankruptcy provision requires disclosure when a party "directly or indirectly" owns 10 percent or more of "any class" of a publicly *or* privately held corporation's "equity interests." Members of the Appellate Rules Committee expressed several concerns about the provision approved by the Bankruptcy Rules Committee, objecting both to its substance and to its ambiguity.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the amendment, which, he says, "will strip away a veil of concealment."

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) sympathizes with the practical considerations that led to the proposal that the Judicial Conference have authority to modify disclosure requirements without going through the Rules Enabling Act process, but the Association fears that "the necessary contents of a disclosure statement may be less accessible to the bar and to the public if they are not set forth in the rules themselves."

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

The **Committee on Federal Civil Procedure of the American College of Trial Lawyers** (00-AP-10) supports expanding the obligation to file disclosure statements to non-corporate parties, as

Rule 26.1(a)(2) does. However, the Committee opposes granting authority to the Judicial Conference to modify disclosure obligations without going through the Rules Enabling Act process. Lawyers will not be able to know the nature of their obligations without contacting the Judicial Conference directly before every case, which will create an administrative burden for the staff of the Conference and waste the time of attorneys. "It is difficult to see the merit of referencing a set of requirements that are not included in the Rules, may not exist and are not readily available."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) strongly supports two aspects of the proposal — extending the disclosure obligation to non-corporate parties and requiring supplementation — but is "appalled" by a third — giving authority to the Judicial Conference to modify the disclosure obligation without going through the Rules Enabling Act process. Judge Easterbrook's objections to the Judicial Conference provision are several: (1) The provision short-circuits the Rules Enabling Act process. The judicial branch keeps telling Congress not to short-circuit the process; the judicial branch impairs its credibility when it short-circuits the process itself. (2) The provision would weaken the role of the Standing Committee. "Other Committees of the Conference will see (and use) an opening into rules-related issues, and the ability of the Standing Committee to coordinate matters of practice and procedure will be undermined." (3) The provision would create a hardship for lawyers, as the Judicial Conference does not publish its standards in any central, readily accessible location. Judge Easterbrook recalls that some years ago the Advisory Committee on Appellate Rules proposed that the Judicial Conference be given authority to set technical standards for briefs, and that the proposal was rejected by the Standing Committee on the grounds described above. He urges that the Judicial Conference provision of proposed Rule 26.1 suffer a similar fate.

Judge Easterbrook also questions the assertion in the Committee Note that standards on disclosure issued by the Judicial Conference could preempt local rules. He points out that Rule 47(a)(1) provides that local rules "must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Judge Easterbrook interprets Rule 47(a)(1) to provide that "[o]nly statutes, rules, and one *particular* Judicial Conference action supersede local rules."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) opposes the proposal. The Committee believes that "more than enough information is already being disclosed pursuant to the current version of Rule 26[.1] and the various local rules." It objects to the Judicial Conference provision because attorneys will have difficulty ascertaining what the Judicial Conference requires and because the provision is not authorized by the Rules Enabling Act.

Rule 27. Motions

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(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

* * * * *

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the

case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

* * * * *

Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

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1. Recommendation

The Committee proposes to amend Rule 27(d)(1)(B) to provide that, if a cover is voluntarily used on a motion, response to a motion, or reply to a response to a motion, the cover must be white.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals. (See Judge Easterbrook's comments on Rule 32(a)(2).)

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal, which, it notes, reflects what "is currently the general practice in the Courts of Appeals."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any

supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

* * * * *

Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs.

Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

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1. Recommendation

The Committee proposes to amend Rule 32(a)(2) to provide that the cover on a supplemental brief must be tan.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals — which, he says, are "more fiddly changes that will lead courts to reject documents without promoting any important interest." He argues that the lack of uniformity among circuits "poses no practical problems for lawyers," as it is no worse than the lack of uniformity on other matters. If lack of uniformity is a problem, he suggests simply providing that "lawyers [may] choose their own colors."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not object to the proposal, but it doubts the seriousness of the problem that the proposal is intended to address. "The rationale for the colored covers is to allow the court to pick out a brief by seeing the color. Because supplemental briefs often are filed after argument (or submission) picking them out is no problem." The Committee added that "a good case can be made" for requiring that a supplemental brief be the same color as the principal brief it supplements.

The Committee urged that the Advisory Committee on Appellate Rules consider further changes to Rule 32 to address the colors of briefs filed in cases involving cross-appeals. It noted conflicting practice within the circuits and asked "that the Advisory Committee . . . impose some uniformity in covers on cross-appeals."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for <u>panel</u> rehearing and a petition for

hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~;~~ ~~and~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

* * * * *

Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring

yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

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1. Recommendation

The Committee proposes to amend Rule 32(c)(2)(A) to provide that, if a cover is voluntarily used on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, or response to a petition for hearing or rehearing en banc, the cover must be white.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals. (See Judge Easterbrook's comments on Rule 32(a)(2).) If Rule 32(c)(2)(A) is to specify colors, then Judge Easterbrook urges "different colors for petitions and responses," just as different colors are used for appellants' and appellees' briefs. He points out that the Supreme Court requires tan covers on petitions and orange covers on responses, and suggests that Rule 32 do likewise, so as to achieve "vertical as well as horizontal uniformity." Alternatively, he suggests the Seventh Circuit's approach of requiring that the colors of the petitions and responses be the same as the colors of the filing parties' briefs on the merits.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 28. Briefs

* * * * *

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after

the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the

body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 350 words. All words found in footnotes will count toward the 350-word limit.

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1. Recommendation

The Committee proposes to amend Rule 28(j) to eliminate the prohibition on "argument" in letters that draw the court's attention to supplemental authorities and to impose a 350-word limit on such letters.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that the word limit was increased from 250 to 350 in response to the complaint of some commentators that parties would have difficulty bringing multiple supplemental authorities to the attention of the court in one 250-word letter.

3. Summary of Public Comments

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) strongly supports the amendment, as the prohibition on argument in the current version of Rule 28(j) "is regularly and blatantly flouted." In order to prevent similar disregard of amended Rule 28(j), the Association proposes that the penultimate sentence be rewritten as follows: "The letter (including all contents, footnotes, and attachments other than the supplemental authorities which are the subject of the letter, but excluding the address, salutation, signature, and copy recipients) must

not exceed 250 words, and the number of such words shall be set forth at the foot of the letter." The Association further recommends that Rule 25(a)(4) be amended to instruct clerks to refuse to accept letters that do not comply with Rule 28(j).

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, except that it urges that Rule 28(j) letters be limited to 400 words, instead of 250 words. The Group argues that "a 250-word limit . . . will be unduly restrictive in some circumstances," such as in "complex cases [when] it is often difficult to state the holding of the new authority and its relationship to the arguments made in the briefs . . . in fewer than 250 words, even without argument." The Group also expresses concern about imposing a word limit — whether it be 250 words or 400 words — to Rule 28(j) letters that address multiple authorities. The Group is concerned that counsel, finding that 250 or 400 words is insufficient to discuss multiple authorities, will instead submit a separate letter on each authority, which will be burdensome for all involved. The Group recommends that the word limit "be imposed on a per-issue basis."

Eric A. Johnson, Esq. (00-AP-009) opposes the proposal. He believes that permitting parties to argue in Rule 28(j) submissions would "exacerbate the unfairness that often arises from inequality of resources." He recommends retention of the prohibition on argument.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** raises a number of concerns about the proposal. Some members of the Committee oppose any change to the rule; they fear that courts may be "inundated" with Rule 28(j) letters "because the new language contemplates a response to a [Rule 28(j)] letter" and because "[t]he proposed rule places no limitation on the number of 250-word letters any party would be entitled to submit." Other

members believe that the 250-word limit is too low, especially when the party seeks to bring several new cases to the attention of the court. These members suggest that, at a minimum, the amendment provide that the words and numerals contained in the citations themselves not count toward the 250-word limit. The Committee also suggests that consideration be given to requiring that Rule 28(j) letters be accompanied by a certificate of compliance.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) views the proposal as "sound in principle."

The **Appellate Practice Section of the State Bar of Michigan** supports the proposal, except that it recommends that "case names and citations" not count toward the 250-word limit.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal. It agrees that the current prohibition on "argument" is violated in "almost all letters to Courts of Appeals."

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, although it expresses concern that the 250-word limit is insufficient when a party wishes to bring several supplemental authorities to the attention of the court. It suggests revising Rule 28(j) "to allow 250 words, or 150 words for each new authority, whichever is longer."

Rule 31. Serving and Filing Briefs

* * * * *

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

* * * * *

Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to

clarify that briefs must be served on all parties, including those who are not represented by counsel.

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1. Recommendation

The Committee proposes to amend Rule 31(b) to clarify that briefs must be served on all parties, including those not represented by counsel.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal. It recommends that Rule 31(b) be further amended to require service of one copy of each brief on each known amicus. (At present, the rule requires service only on parties.)

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) believes that the proposal represents "[a]n improvement."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(C) **Certificate of compliance.**

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

~~(i)~~ ● the number of words in the brief; or

~~(ii)~~ ● the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

1. Recommendation

The Committee proposes to amend Rule 32(a)(7)(C) to provide that the filing of a new Form 6 must be regarded as sufficient to meet the obligation imposed by Rule 32(a)(7)(C) to certify that a brief complies with the type-volume limitation of Rule 32(a)(7)(B). The Committee also proposes to add a new Form 6 as a suggested form of a certificate of compliance with the type-volume limitation of Rule 32(a)(7)(B).

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- □ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

- □ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

□ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

□ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, although it suggests that Form 6 be amended to refer to "the *applicable* type-volume limitation" rather than to "the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)," to account for the fact that, in some cases, the length of briefs will be controlled by court order rather than by Rule 32(a)(7)(B).

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(~~d~~e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. Only the original copy of every paper must be signed. An appendix filed with the court does not have to be signed at all.

By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

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1. Recommendation

The Committee proposes to amend Rule 32(d) to provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. A line was added to the Committee Note to clarify that only the original copy of a paper needs to be signed.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) calls the proposal "a thoroughly bad idea" and raises numerous objections: (1) The signature requirement is pointless. It is not necessary to require a signature in order to "ensure[] that a readily identifiable attorney or party takes responsibility for every paper." Right now, "[e]very lawyer whose name appears on a brief or other paper . . . is responsible." (2) The signature requirement would not work. Papers

are most likely to be signed not by the lawyer who truly is responsible, but by "some junior associate." (3) The signature requirement would create a hardship for counsel. Lawyers will have to visit printers or duplicators (such as Kinko's) to sign briefs, or printers or duplicators will have to ship briefs back to the law firm for signing, rather than shipping the briefs directly to the clerk for filing. (4) The signature requirement would be "retrograde." We live in the electronic age; "the world is moving in the direction of dispensing with manuscript signatures."

Judge Easterbrook further suggests that if the Advisory Committee wants to fix responsibility for a paper on a particular attorney, it should follow Supreme Court practice, and require that every paper must designate the "counsel of record." That fixes responsibility without requiring anyone to waste time signing papers.

Finally, Judge Easterbrook argues that, if there is to be a signing requirement, Rule 32(d) should be rewritten to make two things clear: (1) Only one copy of any document must be signed. (2) The signature must be of the lawyer principally responsible for the substance (not necessarily the drafting) of the document.

The **National Association of Criminal Defense Lawyers** (00-AP-019) does not oppose the proposal, but raises several questions: "Does the committee mean that the original of each must be personally signed manually, in ink, although some or all of the rest may be conformed? Or would it comply to sign the brief before copying, so that all copies would bear a copy of counsel's signature, but none would have an original ink signature? May counsel delegate the right to sign his or her name to a secretary . . . or must the signature be affixed personally?"

The Association also suggests that a reference to 28 U.S.C. § 1927 should be added to the discussion of sanctions in the Committee Note. Finally, the Association suggests that a reference to new Rule 32(d) be added to Rule 28, which lists the contents of briefs.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the

> United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

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1. Recommendation

The Committee proposes to add a Rule 44(b) to require a party to give written notice to the clerk if the party questions the constitutionality of a state statute in a proceeding in which the state is not a party, and to require the clerk to notify the state's attorney general of that challenge. Rule 44(b) is intended to implement 28 U.S.C. § 2403(b).

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

Judge Barbara B. Crabb (W.D. Wis.) (00-AP-001) supports the proposed amendment as a helpful reminder to judges. She suggests that something akin to Rule 44 be added to the FRCP.

Jack E. Horsley, Esq. (00-AP-002) suggests that the following clause be added to Rule 44(b): "Absent certification and/or failure to raise a constitu[t]ional question at the outset precludes asserting a[] [c]onstitutional violation on appeal."

Public Service Litigation Group (00-AP-005) supports the proposal. It notes that § 2403(b) refers only to statutes "affecting the public interest," but agrees that the rule should not be so restricted, given the uncertain scope of that clause.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal — "[a] genuine improvement, nicely executed."

The **National Association of Criminal Defense Lawyers** (00-AP-019) recommends that the phrase "in a proceeding" be replaced by the phrase "in any civil or criminal case" to highlight the fact that the constitutionality of state statutes sometimes is challenged in federal criminal cases. State criminal statutes are often incorporated into federal criminal statutes (e.g., the Assimilative Crimes Act), and state statutes sometimes govern the legality of an arrest or search by state law enforcement officers. The change suggested by the Association would highlight the fact that Rule 44(b) may have some application in criminal cases.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

General Comments

Jack E. Horsley, Esq. (00-AP-002) said that the "work product of [the] Committee is so good" that "[i]t is a challenge to submit viable suggestions."

The **United States Postal Service** (00-AP-003) agrees with many of the proposals and believes that the others will not have a substantial effect on the Postal Service. It opposes only the amendment to Rule 4(a)(5)(A)(ii).

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) supports all of the proposed amendments, save the amendments on which it specifically commented.

Sidney Powell, Esq. and **Deborah Pearce Reggio, Esq.** (00-AP-016) fully endorse the "thorough and considered comments" of the Public Citizen Litigation Group.